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IN THE

SUPREME COURT OF THE UNITED STATES

LARRY CARL IVES,

Petitioner,

v.

BOBBY BOONE, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX A -- MAGISTRATE'S REPORT AND RECOMMENDATION DATED OCTOBER 25, 2001

SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY CARL IVES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No.CIV-98-363-A**
	)	
BOBBY BOONE, Warden,	)	
	)	
Respondent,	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing through counsel, brings this action pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus. In a previous referral, the undersigned recommend that the petition be denied except for four issues. As to those four issues, it was recommended that the parties provide supplemental briefing. United State District Judge Wayne E. Alley adopted the recommendation, and directed the parties to provide supplemental briefing on the following issues: (1) whether the trial court improperly allowed expert testimony vouching for the truthfulness of the victim's testimony; (2) whether the Petitioner's trial counsel was constitutionally ineffective for failing to call Laura Wilson as a defense witness; (3) whether Petitioner's trial counsel labored under a conflict of interest that adversely affected his performance; and (4) whether an evidentiary hearing is required regarding the conflict of interest issue. The case was then recommitted to the undersigned

Magistrate Judge for further preliminary proceedings consistent with 28 U.S.C. § 636(b)(1)(B). As directed by Judge Alley, a supplemental response to the petition has been filed, and Petitioner has replied. Thus, the matter is again at issue.

By this action, the Petitioner challenges his conviction of incest after former conviction of two or more felonies, for which he was sentenced to eight years imprisonment.[1] Case No. CRF-89-5444, District Court of Oklahoma County.

I. Procedural History

Following his conviction and sentencing on February 13, 1990, for rape and incest, the Petitioner filed a direct appeal in the Oklahoma Court of Criminal Appeals. In that appeal, the Petitioner was represented by a new attorney, who raised nine propositions of error.[2] The Petitioner and his attorney also jointly filed a

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[1] The Petitioner was also convicted of and sentenced for rape, but this count was reversed on the Petitioner's direct appeal. See Ives v. State, No. F-90-870 (Okla. Crim. App. Mar 11, 1994)

[2] The Petitioner's appellate counsel raised the following propositions of error: (1) The Petitioner's conviction of both rape and incest violated the double jeopardy clause of the Fifth Amendment; (2) the admission of expert testimony that the alleged victim was truthful violated the Petitioner's right to s fair trial; (3) the trial court erred by allowing lay witnesses to testify regarding the alleged victim's capacity for truthfulness; (4) the evidence presented was insufficient to prove that the Petitioner committed incest; (5) the trial court erred by failing to direct a verdict in the Petitioner's favor on the incest count; (6) the trial court erred by refusing to give Petitioner's requested jury instruction regarding the necessity of corroboration of the alleged victim's testimony; (7) it was fundamental error to allow the state's expert to testify that the alleged victim suffered from post-traumatic stress disorder; (8) the Petitioner was denied effective assistance of trial counsel; and (9) the Petitioner's sentences were excessive.

"Supplemental Pro Se Brief of Appellant", raising additional propositions of error. However, the Court of Criminal Appeals found this supplemental brief to be improperly filed, and deemed the issues raised therein to be waived on appeal.[3] In a summary opinion, the Oklahoma Court of Criminal Appeals granted relief to the Petitioner as to his rape conviction, which was reversed, but denied any relief with respect to his conviction for incest. See Ives v. State, No. F-90-870 (Okla. Crim. App. Mar 11, 1994).

On March 4, 1997, the Petitioner filed an application for post-conviction relief in the Oklahoma County District Court. The Petitioner raised nine propositions of error. [4] The district court held that all of the Petitioner's claims, other than his claim he was denied effective assistance of appellate counsel, had already been raised and rejected on direct appeal or could have been raised on direct appeal, and that they were therefore barred by the doctrine of res judicata or waived. Additionally, the court held that there was no evidence to suggest that the Petitioner was denied effective assistance of appellate counsel and denied the Petitioner's application for post-conviction relief. See Ives v. State, No. CF-89-4544 (Dist. Ct. Okla. Co. May 14, 1997). The Oklahoma Court of

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[3] The Petitioner raised Ground Five (a) of his instant petition in that supplemental brief, and he expanded upon his arguments on tow other propositions of error that he raised in his direct appeal brief.

[4] The Petitioner raised the following propositions of error: (I) his sentence was improperly enhanced; (II) he was punished twice for the same offense in violation of the Fifth Amendment; (III) & (VI) prosecutorial misconduct deprived him of a fair trial; (IV) the trial court erred by allowing expert and lay witnesses to testify regarding the alleged victim's capacity for truthfulness; (V) the trial court improperly instructed the jury; (VII) the accumulation of irregularities, errors, and prosecutorial misconduct denied the Petitioner of a fair trial; (VIII) the prosecution withheld and concealed exculpatory evidence; and (IX) the Petitioner was denied effective assistance of both trial and appellate counsel.

Criminal Appeals affirmed the denial of post-conviction relief on January 13, 1998, for substantially the same reasons cited by the district court. See Ives v. State, No. PO-97-704 (Okla. Crim. App. Jan. 13, 1998). The Petitioner then filed the instant petition on January 30, 1998.

As noted above, the undersigned Magistrate Judge recommended denial of the petition, except for four issues upon which supplemental briefing was needed. Petitioner objected in part to the recommended, and Respondent did not object. [5] Judge Alley adopted the recommendation in its entirety.

II. Standard for Granting a Writ of Habeas Corpus

The parties agree on the standard to be applied by this Court in considering the remaining issues. Review of actual and legal issues that have already been adjudicated in state court is laid out in 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

[5] The undersigned notes Respondent's reassertion of this claim that Petitioner's ineffective assistance of trial counsel claim based upon an alleged conflict of interest is procedurally barred.

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Habeas relief may therefore be granted if the Court finds that "the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, decided the case differently than the Supreme Court has on a set of materially indistinguishable facts; or unreasonably applied the governing legal principle to the facts of the prisoner's case." Elliott v. Williams, 248 F.3d 1205, 1207 (10th Cir. 2001), cert. denied____ S.Ct. ____ Oct. 1, 2001).

III. Issues Remaining

A. Ineffective Assistance of Trial Counsel

As noted above, three of the four remaining issues are related to the performance of trial counsel. The first is whether the failure to call Laura Wilson, Petitioner's wife and the victim's mother, amounted to ineffective assistance of counsel in violation of Petitioner's Six Amendment rights. The second and related issue is whether Petitioner was denied effective assistance of counsel due to a disabling conflict of interest on the part of trial counsel. The third issue is whether an evidentiary hearing is required regarding Petitioner's allegation that trial counsel had a disabling conflict of interest. As will be explained below, the undersigned will address these issues in reverse order after a brief introduction.

1. Failure to call Laura Wilson as a defense witness.

Petitioner argues that his trial counsel was ineffective based on his failure to call Ms. Wilson,

Petitioner's wife and the victim's mother, as a witness for the defense. Specifically, he alleges that Ms. Wilson's testimony, if offered, would have severely undermined his daughter's credibility and bolstered that of Petitioner. He notes that trial counsel promised both the trial judge and the jury that she would testify, but later failed to call her as a witness without explanation.

2. Trial counsel's alleged conflict of interest

Petitioner further argues that trial counsel's failure to call Ms. Wilson was due to an undisclosed conflict of interest created by the fact that Ms. Wilson was being represented by trial counsel's law partner in ongoing juvenile court proceeding in which the district attorney's office "still held away over her parental rights". He argues that trial counsel failed to call Ms. Wilson to testify in Petitioner's behalf because it was not in Ms. Wilson's interest to oppose the district attorney's office in any way. Thus, Petitioner argues that trial counsel had an actual conflict of interest that deprived him of effective assistance of counsel.

3. Need for an evidentiary hearing

Although Petitioner attempted to raise the conflict of interest issue on direct appeal by his pro se "Motion for a New Trial with Brief in Support", "Motion to Supplement Pro Se Brief and Request to File Additional Documents", and "Supplemental Pro Se Brief of Appellant", he was not allowed to develop the factual basis for the claim. See Ives v. State, Case No. F-90-870, slip op. (Okla. Crim. App. Mar. 11, 1994) (Attached as Ex. B to Response to Petition for Writ of Habeas Corpus).[6] That – together with Respondent's complete

[6] The Oklahoma Court of Criminal Appeals stated that Petitioner's pro se Motion for a New Trial with Brief in Support was considered "as it

failure to address the conflict of interest issue in its original response – led the undersigned to request a brief on not only the conflict of interest issue, but on the necessity for an evidentiary hearing.

The undersigned finds that a hearing is necessary to determine whether an actual conflict of interest existed on the part of trial counsel. Because the undersigned recommends a hearing on that issue, it is also recommended that the Court defer consideration of the issue of whether trial counsel's failure to call Ms. Wilson was a witness constituted ineffective assistance. The evidence developed at the hearing on the conflict of interest issue, and perhaps the resolution of that issue, could affect determination of the ineffective assistance issue relating to the failure to call Ms. Wilson.

The Sixth Amendment right to counsel includes the "right to representation that is free from conflicts of interest". United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990) (quoting Wood v. Georgia, 450 U.S. 261, 271 (1981). Where there has been no timely objection at trial, a petitioner must demonstrate "that an actual conflict of interest adversely affected his lawyer's performance." Id (quoting Culver v. Sullivan, 446 U.S. 335, 350 (1980)). The Tenth Circuit has defined "actual conflict" an "adverse effect" as follows:

> [I]n the context of the instant case, we hold that defense counsel's performance was adversely

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pertains to our review of the entire record for fundamental error". Ives v. State, Case No. F-90-870, Slip op. at 1 (Okla. Crim. App. Mar. 11, 1994). It made no statements as to whether the other two pro se motions, the Motion to Supplement Pro Se Brief and Request to File Additional Documents and the Supplemental P0ro Se Brief of Appellant, were considered. Id. at 2.

> affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests. No further showing of prejudice is necessary.

Bowie, 892 F.2d at 1500 (citations omitted). In support of his conflict of interest claim, Petitioner contends that his trial counsel and Mr. Kite – the lawyer who defended his wife in juvenile proceedings stemming from this same incident – were members of the same law firm. Respondent claims that Petitioner has not shown an actual conflict, but rather "baldly asserts that his counsel "actively represented conflicting interests". Supplemental Response, p. 24. Respondent continues that "trial counsel has unreservedly rebuffed [P]etitioner's bald assertions." Id. As proof, Respondent attaches a letter from Petitioner's trial counsel. Id., Supp. Ex. 1 (Letter from Larry W. Tedder to Patrick Crawley, dated January 23, 2001).

Despite Respondent's characterization of the conflict of interest claim, Petitioner has specifically identified evidentiary support for his allegation that trial counsel and counsel for Ms. Wilson were member of the same firm. Brief of Petitioner [Doc. No. 64], pp. 12-13. Petitioner cites evidence that (1) trial counsel and Mr. Kite shared offices and information regarding the case; (2) Petitioner and his family were told that trial counsel and Mr. Kite were members of the same law firm; (3) in an unrelated news story, The Daily Oklahoman referred to the law offices shared by trial counsel and Mr. Kite as a law firm; (4) trial counsel used letterhead listing trial counsel, Mr. Kite, and two other lawyers; (5) in a brief filed in later divorce proceedings between Petitioner and

Ms. Wilson, Mr. Kite confirmed that trial counsel and Mr. Kite officed together and that Ms. Kite's representation of Ms. Wilson continued after Petitioner's conviction; and (6) the Judge who presided over the criminal trial referred to "other members of trial counsel's firm" in a colloquy concerning the possibility that one of the other members would have to be substituted for ailing trial counsel. Id. at 12-13. Moreover, during voir dire, the judge asked Mr. Tedder to name the other lawyers in his firm, and Mr. Tedder named Mr. Kite. Transcript of Jury Trial, Vol. I, p. 45.

In arguing that trial counsel and Mr. Kite were not members of the same law firm, Respondent apparently concedes that multiple representation by lawyers in the same firm would result in an imputed conflict of interest under the Oklahoma Rules of Professional Conduct, Rule 1.10, Okla. Stat. Tit. 5, Ch. 1, App. 3-A: "(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8, 1.9 or 2.2." The comment to the rule explains the principle involved:

> The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated...

Okla. R. Prof. Conduct, Rule 1.10, cmt. (West 2001).

Particularly germane to the issue of whether an evidentiary hearing is required is the comment defining "firm." For purposes of the Rule of Professional Conduct, the term "firm" includes lawyers in a private firm...Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as in the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other. Id. At a minimum, Petitioner has presented enough evidence to warrant further fact-finding regarding the issue of whether trial counsel and Mr. Kite were indeed members of the same law firm, and whether the multiple representation of Petitioner and Ms. Wilson in separate litigation stemming from the same incident constituted a conflict of interest. See United States v. Gallegos, 975 F.2d 710, 713 (10th Cir. 1992)(discussing possible conflict arising from multiple representation).

As the Tenth Circuit stated in United States v. Alvarez: "If the client can establish the conflict actually affected the adequacy of his representation, prejudice is

presumed". 137 F.3d 1249, 1251 (10th Cir. 1998)(citing United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990)). The "adverse effect" here was trial counsel's failure to call Ms. Wilson as a witness, despite his stated contrary intent. Petitioner's decision to testify was apparently based upon his belief that Ms. Wilson's testimony would be available to corroborate his testimony. As Petitioner stated in his affidavit:

> 11. It was in these meetings, just prior to the criminal trial in February 1990, I told [trial counsel] that I would not go on the stand to testify in my own defense if I did not have Laura to corroborate my and the other defense witnesses. He assured me several times that he would be putting Laura on to testify, mainly because she had already testified under oath at the juvenile proceedings. [7]
>
> 12. During the voir dire and opening statements, [trial counsel] asked the jury and assured them that he would be putting Laura on to testify. He had also told my mother, my sister and my aunt (Myrtle Edmond) that he would be putting Laura on to testify, as well as my two experts, a Dr. Erwin Hall and Dr. H. Don Chumley, to corroborate their testimony as well.
>
> 14. At the least of the jury trial, which would have been February 8, a Thursday

[7] In a petition filed in the Juvenile Division of the District Court of Oklahoma County on April 25, 1989, the State sought to have Petitioner's daughter adjudicated as a "deprived child" under Okla. Sta. Tit. 10, § 1101.

[sic] at the end of the day, [trial counsel], my mother, sister and aunt were out in the hallway before I was taken back to the jail, and [trial counsel] told me to write down all the questions that I wanted to make sure for him to ask Laura the next day when she was put on the stand.

15. The next morning before we went back into the courtroom, [trial counsel] came up to me and asked if there was anything that I wanted for him to put in his closing argument. That's when I said that, I wanted the rest of my defense put on and he told me that he wouldn't be putting Laura on. I got the impression since it as Friday [sic] he just wanted to finish the trial and be over with.

16. The Sunday [sic] after the trial, [trial counsel] came to the county jail (February 11, 1990) and finally saw me. The formal sentencing was set for the following Tuesday [sic] February 13, 1990 (trial ended on February 9, 1990). It was at this time I presented to him a hand written letter that I was planning on giving to the Judge (Henderson) about how I felt I didn't get a fair trial when for some reason my counsel refused to put on a vital defense witness. It was at this time I got first hint of what conflict of interest was, because when he read this, he threatened me that if I showed this to the judge, he would not be there for the sentencing.

Affidavit of Larry Carl Ives, Vol. 6, Ex. T Appendix of Exhibits.

The Bowie definition of adverse affect as a "specific and seemingly valid or genuine alternative strategy" that was available to defense counsel, but which "was inherently in conflict with his duties toothers" could – depending upon the facts – be applicable here. In addition to the decision not to call Ms. Wilson, Petitioner states that "[trial counsel] failed to tell me for some times, Laura had been giving letters that I had wrote to her from the county jail to the state prosecutor (D.A.) and had started cooperating with the state in other areas, as in the still (to my knowledge) pending juvenile proceddings. That her doing this was done with the knowledge of her counsel Mr. Kite." Affidavit of Larry Carl Ives, ¶ 10 (Appendix of Exhibits, Vo. 6, Ex. T [Doc. No. 65]). The letter from trial counsel to Respondent corroborates this statement: "As we got closer to trial, however, Tom Kite told me that Laura's attitude toward Mr. Ives had changed and that she now believed her daughter." Supp. Ex. 1 to Supplemental Response (Letter of January 23, 2001, to Respondent's attorney from Larry Tedder.) Even if trial counsel was correct that Ms. Wilson's testimony might be different than he anticipated, he had Ms. Wilson's previous sworn testimony in the juvenile proceeding to use as impeachment. If the decision not to call Ms. Wilson was at all affected by conflicting loyalties to Wilson and Petitioner, it was arguably resolved in favor of Wilson at petitioner's expense.

A very similar situation was found to constitute an actual conflict of interest in Mann v. Ward, Case No. CIV-94-1489-A, slip op. at 24-25 (W.D. Okla. Dec. 13, 1995). In reaching his conclusion, Judge Alley quoted

from Church v. Sullivan: "The danger inherent in successive and multiple representations do not become apparent merely by scrutinizing what the attorney did; 'representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.'" 942 F.2d 1501, 1512 (10th Cir. 1991) (quoting Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978)).

The undersigned finds that an evidentiary hearing is required to determine the conflict of interest issue. Petitioner has raised a colorable claim that trial counsel and Mr. Kite were members of the same firm, and that trial counsel failed to employ a seemingly valid strategy of calling Ms. Wilson and using her prior testimony, if necessary, as impeachment. If trial counsel and Mr. Kite were both members of the same firm, and there was an inherent conflict between the strategy of calling Ms. Wilson as a witness in Petitioner's criminal trial and the firm's loyalty to Ms. Wilson as a client in the juvenile proceeding, no further showing of prejudice is necessary. See United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990).

At a minimum,[8] the facts discovered at the hearing on the conflict issue will shed light on the issue of whether trail counsel was ineffective for failing to call Ms. Wilson. Accordingly, the undersigned further recommends that the Court defer its decision on that issue until after the evidentiary hearing.

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[8] If the evidence shows that an actual conflict adversely affected trial counsel's performance on behalf of Petitioner, it may well be unnecessary to make any further determination as to this ineffective assistance claim.

B. Testimony Vouching for the Victim

The remaining issue is whether the trial court improperly allowed witness testimony vouching for the testimony of Petitioner's daughter, the alleged victim. Among other testimony, Petitioner cites to that of a psychiatrist, Dr. Worley, in which she stated: "[I]n my experience you can tell when somebody is not telling you the truth. In my medical opinion she was sincere when I saw her." (Tr. 450.) Additionally, another psychiatrist, Dr. Calenzani, testified that he believed the victim to have been "in full contact with reality" and that he "fully believe[d] her." (Tr. 493.) Petitioner also cites to such vouching testimony by two lay witnesses.

These points were raised on direct appeal. The Oklahoma Court of Criminal Appeals described the propositions of error as follows "II. Fundamental error occurred with the admission of expert testimony that the alleged victim was truthful; and the allowance of such deprived Appellant of the right to a fair trial. III. The trail court erred in allowing lay witnesses to express opinions as to the victim's capacity for truthfulness." Ives v. State, Case No. F-90-870, slip op. at 2 (Okla. Crim. App. Mar. 11, 1994). The Oklahoma Court of Criminal Appeals found that with regard to these alleged errors "neither reversal nor modification is required under the law and evidence, nor is there a need to remand for an evidentiary hearing. Ives v. State, Case No. F-90-870. slip op. at 3 (Okla. Crim. App. Mar. 11, 1994).[9]

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[9] These same two errors were also raised in Petitioner's application for post-conviction relief: "IV Fundamental error of expert and lay witnesses vouching for the truthfulness of the alleged child victim, including psychiatric testimony that the incest occurred and that it was committed by Petitioner, which requires reversal where the State relies solely on testimonial evidence, in violation of Fourteenth Amendment equal

Peritonea's claim regarding vouching was thus considered and rejected on direct appeal. Accordingly, under 28 U.S.C. c 2254(d), Petitioner may not be granted habeas relief on this claim unless the state court's adjudication (1) resulted in a decision that was 'contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. A state court decision is "contrary to, or involve[s] an unreasonable application of clearly established Federal Law," for purposes of 28 U.S.C. § 2254(d)(1) if:

(1) the state court decision is in square conflict with the Supreme Court precedent which is controlling on law and fact; or (2) if no such controlling decision exists, the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant Supreme Court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts. In short, habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.

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protection and due process." Ives v. State, Case No. CF-89-4544, slip op. at 3 (Dist. Ct. Okla. County May 14, 1997). However, the state district court declined to consider the issue, concluding that it had been raised on direct appeal and was thus barred by res judicata. Id.

Roberts v. Ward, No. 98-6066, 1999 WL 162751 at *3 (10th Cir. Mar. 25, 1999), petition for cert. filed (Feb. 4, 2000).

Because state court rulings on evidentiary matters involve state law, they are generally unreveiwable on habeas corpus. Martin v. Kaiser, 907 F.2d 931, 934 (10th Cir. 1990) (error in admission of evidence is generally a matte of state law and not cognizable on habeas corpus). Rather, "[s]tate court rulings on the admissibility of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights." Brinlee v. Criso, 608 F.2d 839, 850 (10th Cir. 1979) (citing Gillihan v. Rodriguez, 551 F.2d 1182, 1192-93 (10th Cir. 19977)); Jackson v. Shanks, 143 F.3d 1313, 1322 (10th Cir. 1998); Vigil v. Transy, 917 F.2d 1277, 1280 (10th Cir. 1990); see also, Lee v. McCaughtry, 933 F.2d 536, 538 (7th Cir. 1991) ("[T]here is little point in case-by-case federal review of evidentiary rulings," as habeas review is "not just a rerun of the direct appeal."). The Petitioner is deprived pf a fundamentally fair trial if there is reasonable probability that in the absence of the erroneous evidentiary rulings, the outcome of the trial would have been different. See Tucker v. Kemp, 802 F.2d 1293, 1295-96 (11th Cir. 1986). Moreover, federal law dictates that a defendant cannot complain of an error which he invited upon himself. United States v. Chavez, 229 F.3d 946, 952 (10th Cir. 2000); United States v. Hooks, 780 F.2d 1526, 1534-35 (10th Cir. 1986). This is true under Oklahoma law as well. See Allen v. State, 871 P.2d 79, 95 (Okla. Crim. App. 1994); Harris v. State, 841 P.2d 597, 602 (Okla. Crim. App. 1992) (holding that a party may not complain about invited error).

Here, Petitioner complains that two experts, Dr. Linda Worley and Dr. David Calenzani, offered testimony to the effect that the victim was telling the truth. Brief of Petitioner [Doc. No. 64], p. 7-8. However, a review of the testimony cited by Petitioner reveals that Petitioner on cross-examination somewhat invited the very testimony of which he now complains. For example, the following colloquy took place with regard to Dr. Worley:

> Q. [by Mr. Tedder, counsel for Petitioner] Would it surprise you if you found out that [victim] is not and was not suicidal on April 18, 1989?
>
> A. Would it surprise me?
>
> Q. Yes.
>
> A. I don't know how I would find that out, because I felt like she was. She was writing notes to her teacher.
>
> Q. If you knew that she had testified in this courtroom earlier today that she was not suicidal and never intended to take her life, would you be surprised?
>
> A. I don't know. I think that sometimes people change their stories when they find out what the consequences of saying they're suicidal are. Sometimes they say - -
>
> Q. In other words, again, I'm not trying to put words in your mouth, you believe more of what

she said on March 8 than what she might have said in the courtroom today? April 18, excuse me.

A. I don't think that's the issue here. I mean - -

Q. In making your diagnosis, Doctor, you rely on truthful information, don't you, accurate information.

A. Well, I rely on my interview with the patient.

Q. An you rely on accurate information. If you don't get accurate information you can't make a valid diagnosis, can you?

A. I can make a diagnosis by what information I get. I cannot say whether it's accurate or not.

Q. I understand that, but my point is, if somebody comes in, again, for whatever reason they might have, and tells you a bunch of inaccurate information and you make a diagnosis, that diagnosis may not be valid in reality.

A. In my experience I have - - in my experience you can tell when somebody is not telling the truth. In my medical opinion she was sincere when I saw her.

Tr. Of Jury Trial, Vol II, p. 448, I. 25; p. 449, II. 1-25; p. 450, II. 1-6 (filed herein as Ex. S-5).

Immediately thereafter, Petitioner's counsel moved the court for a mistrial, stating that "this goes and flies directly in the face of my motion in limine the Court sustained as far as an expert opinion having to do with

this little girl telling the truth. The doctor has gone beyond the question I asked her." Id. At p. 450, II. 11-15. The prosecutor argued that the response had been invited, and the court agreed. Id. At p. 450, II. 23-25; p. 451, II. 1-25. Not only was the response invited, the context of the opinion was not whether the victim was being truthful about the sexual abuse, but whether she was actually suicidal on the date in question.

As with the exchange between trial counsel and Dr. Worley, Dr. Calenzani offered the opinion in question in response to questioning on cross-examination.

> Q. But when it comes right down to it, only they know whether they are in fact suicidal; is that right?
>
> A. No.
>
> Q. You wouldn't agree with that?
>
> A. I think that - - you see, there is where we need to make a psychiatric assessment. And the psychiatric assessment is a valid assessment that will come to the conclusion if you are suicidal or not. I think that - - that is what I base my work on.
>
> Q. Would you agree with Dr. Green's conclusion that there is evidence of disordered thinking, perceptual distortion and non-convential [sic] attitudes, all of which suggests that [victim] is not in good contact with reality?
>
> A. I think that [victim] was in full contact with reality. I think that all the information that

she gave me there was a reason it was given. It was a time of enormous turmoil and I fully believe her. That is why I believe.

Id. at 492, II. 7-25; p. 493, II. 1-4.

Petitioner relies upon the Oklahoma Court of Criminal Appeals decision in Lawrence v. State. 796 P.2d 1176, 1177 (Okla. Crim. App. 1990). In that case, the Court concluded that an expert witness cannot vouch for the truthfulness of an alleged victim. Id. The Court reasoned that such testimony was improper because "opinion evidence on who is telling the truth . . . is nothing more than the expert's opinion on how the case should be decided." Id. However, Oklahoma case law also recognizes that "many jurisdictions have allowed expert testimony describing the reactions of typical child victims of sexual abuse if it will assist the jury in deciding whether or not the alleged abuse occurred . . . [T]he fact that such evidence is incidentally corroborative does not render it inadmissible, since most expert testimony, in and of itself, tends to sow that another witness either is or is not telling the truth . . . . However, expert testimony may not be admitted to tell the jury who is correct or incorrect, who is lying and who is telling the truth. "Davenport v. State, 806 P.2d 655, 659 (Okla. Crim App 19991) (citations omitted); see also Okla. Stat. tit. 12, §2704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

Both experts responded fairly to the questions as posed to them. Moreover, the jurors were instructed in this case that it was their responsibility "to determine the credibility of each witness and the weight to be given the

testimony of each witness." Tr. Vol II, p. 267, II. 22-24. They were also instructed, with regard to expert witnesses, that they were "not required to surrender [their] own judgment to that of any person testifying as an expert, or to give controlling effect to the opinion of an expert, for the testimony of an expert, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive." Instruction No. 15, OUJI-CR-843 (Jury Instructions and Verdict Forms) (filed herein as part of Exhibit S-9). Petitioner is therefore not entitled to habeas relief on this claim, as he has not shown that the evidence in question rendered his trial so fundamentally unfair as to constitute a denial of constitutional rights.

Petitioner also complains that another witness, Officer Robert Tunnell, offered testimony that victim appeared "very sincere" when she claimed that "she was afraid of Petitioner because he would do anything to get her." Brief of Petitioner [Doc. No. 64], p. 9 (quoting Tr. Vol. II, p. 403, II. 7-18). This testimony was offered on direct examination:

> Q. [By the prosecutor, Mr. Keel] You said she made a - - with regard to her state of mind and her father at some point that evening while she was in your presence, did she make a statement?
>
> A. During that evening?
>
> Q. Yes, sir.
>
> A. Okay. When we had transported her from Children's to another facility where she would be staying in front of another doctor, she stated that she was afraid of her father and she made the

statement in front of me that, "You don't know what he will do. He will go to any lengths to get me."

Q. And based on your experience, the number of years that you've been a police officer and the number of people that you've talked to in stress-filled situations. Did she appear to be sincere to you when she was speaking of fear of her father?

A. Very.

Tr. Vol II, p. 403, II. 1-18. There was no objection.

This court addresses a similar issue in Swart v. Hargett, Case No. CIV-97-998-A (W.D. Okla.). There an Oklahoma prisoner was convicted of lewd molestation of a minor and forcible oral sodomy. Report and Recommendation at p. 1, Swart v. Hargett, Case No. CIV-97-998-A (W.D. Okla. Dec. 30.1998) (Roberts, J.), adopted Order at p. 3 (W.D. Okla. Mar. 17, 1999) (Alley, J.) (de novo review), appeal dismissed, 208 F.3d 227, 2000 WL 271746 (10th Cir. Mar. 13, 2000) (unpublished op.). The defendant later sought federal habeas relief, claiming that a detective had improperly vouched for the truthfulness of the victims. Id. at 10. This court rejected the claim, concluding that the detective's testimony "did not undermine the fundamental fairness of the trial" or "contribute to a miscarriage of justice . . . ." Id. at pp. 10-11. Moreover, the question here was directed to Officer Tunnell's perception as to the victim's state of mind. Based upon his own past experience, he testified that the victim seemed sincere in her fear of her father. He expressed no opinion about the cause of here fear, or about whether she was being truthful about the alleged

sexual abuse.[10] The undersigned finds that such statements did not undermine the fundamental fairness of the trial nor contribute to a miscarriage of justice.

Accordingly, the state appellate court's determination that the admission of the testimony of these witnesses did not merit relief is not contrary to or an unreasonable application of federal law as decided by the Supreme Court. Petitioner is therefore not entitled to habeas relief on this claim.

RECOMMENDATION

For these reasons, the undersigned recommends that the Court refer the matter back to the undersigned to schedule a hearing on the issues of whether Petitioner's trial counsel labored under a conflict of interest that adversely affected his performance and whether Petitioner's trial counsel was constitutionally ineffective for failing to call Laura Wilson as a defense witness. The undersigned further recommends that the Court deny relief on the ground that the trial court improperly allowed expert testimony vouching for the truthfulness of the victim's testimony. The parties are

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[10] It should be noted that Petitioner does not in his supplemental brief address the propriety of the testimony of two lay witnesses: The victim's grandmother and her teacher. Respondent does address this testimony, stating that at the time of their testimony, the victim's character for truthfulness had been attacked. See Okla. Stat. tit. 12 § 2608; Fed.R.Evid. 608. Respondent also points out that the Oklahoma Evidence Code and the Federal Rules of Evidence allow a lay witness to testify about his or her opinions or inferences that are rationally based upon the witness's perception. See Okla. Stat. tit. 12 § 2701; Fed.R.Evid. 701. The undersigned agrees with Respondent that the testimony was proper, and in any event, did not undermine the fundamental fairness of the trial. Cf. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Vigil v. Tansy, 917 F.2d 1277, 1280 (10th Cir. 1990).

advised of their right to file an objection to this Report and Recommendation with the Clerk of this Court by November 14th, 2001, in accordance with 28 U.S.C. § 636 and Local Civil Rules 72.1 The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal questions contained herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991). Finally, the undersigned recommends that if this report and Recommendation is adopted, the case be recommitted to the undersigned Magistrate Judge for further preliminary proceedings.

ENTERED this 25th day of October, 2001.

DOYLE W. ARGO
UNITED STATES MAGISTRATE JUDGE

SUPPLEMENTAL APPENDIX B – DISTRICT COURT ORDER DATED DECEMBER 18, 2001

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY CARL IVES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-98-363-A**
	)	
BOBBY BOONE, Warden,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court for review of the Report and Recommendation of United States Magistrate Judge Doyle W. Argo issued October 25, 2001, and petitioner's objections.[11] The Report concerns four issues raised by the petition under 28 U.S.C. § 2254. As to one issue – the need for an evidentiary hearing – Judge Argo finds in favor of petitioner. Judge Argo recommends that he convene a hearing on two other issues relating to the performance of trial counsel and that a decision of these issues be deferred until after the hearing. As to the fourth issue – a claim of error in the admission of expert testimony vouching for the child victim's truthfulness – Judge Argo recommends denial of the claim. Petitioner's timely objections trigger the Court's duty to make a de

[11] Respondent has not objected and so has waived further review of the issues addressed in the report.

novo determination of issues raised. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).[12]

Petitioner seeks relief from a 1990 conviction of the incest after former conviction of two or more felonies, and a prison sentence of 80 years. Facts relevant to the improper vouching claim follow. Petitioner was accused of rape and sodomy of his daughter. His defense was that she had fabricated the allegations. Because there was no physical evidence of sexual abuse, the outcome of the trial hinged largely on the jury's assessment of the alleged victim's credibility. At trial, the prosecutor called as witnesses two psychiatrists who had treated the victim, Dr. Linda Worley and Dr. David Calenzani. During cross-examination, each responded to questions of defense counsel with testimony that petitioner now claims impermissibly vouched for the victim's truthfulness. Petitioner sees these statements as "harpoons" (Petr's Obj'n in Part, at 9); but Judge Argo finds them to be "somewhat invited" and fair responses to the questions posed. (Report & Recom. At 16, 19.) More importantly, Judge Argo concludes that petitioner "has not shown that the evidence in question rendered his trial so fundamentally unfair as to constitute a denial of constitutional rights." (Report & Recom. At 19.) Also, crucial to petitioner's quest for relief under § 2254(d)(1), Judge Argo finds that the state appellate court's determination that the admission of the testimony of these witnesses did not merit relief is not contrary to or an unreasonable application of federal law as decided by the Supreme Court." (Report & Recom. At 21.)

Before examining the substance of Judge Argo's findings, the Court first addresses an objection to the

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[12] The Court will consider both objections filed on petitioner's behalf, one prepared by his attorney and one submitted by the petitioner himself.

standard of decision. Judge Argo quotes both the statutory standard of § 2254(d)(1) and an amplification of its "unreasonable application" clause stated in *Roberts v. Ward*, No. 98-6066, 1999 WL 162751 at *3 (10th Cir. Mar. 25, 1999), to the effect that a state court decision is unreasonable if it applies "the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." (Report & Recom. At 14-15.) Petitioner correctly objects to this definition, which the Supreme Court expressly rejected in *Williams v. Taylor*, 529 U.S. 362, 409 (2000). Following *Williams*, the test is simply on of objective unreasonableness. *Id.* at 413.

Turning to Judge Argo's substantive analysis, petitioner objects on several points.[13] In an effort to satisfy the standard of § 2254(d)(1), he argues that the state court's rejection of his improper vouching claim was contrary to clearly established federal law as determined by the United States Supreme Court. This argument is misguided. Petitioner cites decisions involving the Federal Rules of Evidence, not federal constitutional rights. (Petr's Obj'n in Part, at 3-4; Petr's Pro Se Obj'n, at 3-4; discussing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Tome v. United States*, 513 U.S. 150 (1995); *Daubert v. Merrell Dow Pharm., Inc.*,

[13] As noted above, petitioner disagrees with Judge Argo's finding that the alleged vouching testimony was invited by defense counsel. Were it necessary to address this objection, the Court would reach the same conclusion as Judge Argo. The Court's independent review of the trial transcript reveals that the experts' statements were fair responses to questions posed on cross-examination. More fundamentally, the Court questions whether the experts' testimony was the sort of improper vouching prohibited by case law. Both Dr. Worley and Dr. Calenzani expressed confidence in their diagnoses; they testified about whether the alleged victim was truly suicidal. Neither addressed the truthfulness of her allegations of sexual abuse.

509 U.S. 579 (1993); *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999)).[14] Evidentiary errors in the petitioner's state court trial warrant habeas relief only if "they rendered the trial so fundamentally unfair that a denial of constitutional rights results." *Mayes v. Gibson*, 210 F.3d 1284, 1293 (10th Cir. 2000); *Duvall v. Reynolds*, 139 F.3d 768, 787 (10th Cir. 1998); *see Estelle v. McGuire*, 502 U.S. 62, 70 (1991). Thus the dispositive issue is whether petitioner has demonstrated that the erroneous admission of vouching testimony deprived him of a fair trial.

Petitioner criticizes Judge Argo's analysis of this issue as complete. Petitioner contends that Judge Argo failed to consider the prejudicial impact of the experts' testimony and the weakness of the prosecution's case. The Court finds merit in petitioner's legal premise.[15] The court of appeals has explained the proper analysis as follows:

> When the admission of evidence in a state trial is challenged on federal habeas, the question is whether the error, if any, was so grossly

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[14] The Court here provides a correct citation obtained through independent research. Both petitioner and his counsel incorrectly cite a vacated opinion in United States v. Charley, 176 F.3d 1265 (10th Cir. 1999), that was withdrawn and superseded on rehearing.

[15] Petitioner argues that the jury acquitted him of sodomy because this court alone was not affected by the vouching testimony. From the pro se objection, the Court gleans the basis of this argument to be that Dr. Worley testified about traits of victims of incest and rape; she did not mention sodomy. However, Dr. Worley also testified generally about sexual abuse. After careful review of the petitioner's arguments and the record, the Court finds no principled way to distingui9sh among the charges when considering the alleged prejudicial effect of the experts' testimony.

> prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process. This assessment requires examining both the reliability of the evidence and the significance at trial.

Williamson v. Ward, 110 F.3d 1508, 1522 (10th Cir. 1997) (citations omitted). The Court disagrees with petitioner, however, that any evidentiary errors denied him a fair trial. The credibility issues outlined in his brief (Petr's Obj'n in Part, at 4-7), were presented to the jury. The fact that petitioner was found guilty of rape and incest but acquitted of sodomy demonstrates that the jurors were capable of judging critically the victim's allegations and of rejecting those that were not proved beyond a reasonable doubt. Because jurors did not fully accept fully the truth of her accusations, the experts' testimony did not have the alleged effect of "put[ting] their scientific stamp of approval/validity to" the victim's story.[16] (Petr's Pro Se Obj'n at 7.) The two alleged instances of improper vouching appear in a trial transcript that spans over eight hundred pages. In the Court's view, the testimony of which petitioner now complains did not significantly impact the outcome of the case. The Court cannot say that the state courts' decision represents an unreasonable application of federal constitutional law.

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[16] Petitioner argues that the jury acquitted him of sodomy because this court alone was not affected by the vouching testimony. From the pro se objection, the Court gleans the basis of this argument to be that Dr. Worley testified about traits of victims of incest and rape; she did not mention sodomy. However, Dr. Worley also testified generally about sexual abuse. After careful review of petitioner's arguments and the record, the Court finds no principled way to distinguish among the charges when considering the alleged prejudicial effect of the experts' testimony.

For all of these reasons, the Court overrules petitioner's objections and adopts the Report and Recommendation. The matter is again referred to Judge Argo, this time for an evidentiary hearing on the remaining two issues relating to performance of trial counsel: (1) whether petitioner's trial counsel labored under a conflict of interest that adversely affected his performance; and (2) whether petitioner's trial counsel was constitutionally ineffective for failing to call Laura Wilson as a defense witness.

Petitioner's Motion for Leave of Court to File a Petitioner's Pro Se Objection (Docket No. 70) is granted. His previous pro se motions for leave to file a reply brief and for a judicial ruling (Docket Nos. 63, 66 & 67) are moot.

WAYNE ALLEY
United States District Judge

SUPPLEMENTAL APPENDIX C – MAGISTRATE'S REPORT AND RECOMMENDATION DATED MARCH 28, 2002

SUPPLEMENTAL APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY CARL IVES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-98-363-A**
	)	
BOBBY BOONE, Warden,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing through counsel, brings this action pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus. In a previous report and recommendation, the undersigned recommended that a hearing be conducted on two issues. United States District Judge Wayne E. Alley adopted the recommendation, and referred the matter for an evidentiary hearing on those two issues, both of which are related to the performance of Petitioner's trial counsel: (1) whether Petitioner's trial counsel labored under a conflict of interest that adversely affected his performance; and (2) whether Petitioner's trial counsel was constitutionally ineffective for failing to call Laura Wilson as a defense witness. An evidentiary hearing was conducted on February 28 and March 1, 2002, and this Report and Recommendation is now entered. For the

reasons set forth herein, it is recommended that the petition be denied.

By this action, Petitioner challenges his conviction of incest after former conviction of two or more felonies, for which he was sentenced to eighty years imprisonment. Case No. CRF-89-5444, District Court of Oklahoma County.

Procedural History

Following his conviction and sentencing on February 13, 1990, for rape and incest, Petitioner filed a direct appeal in the Oklahoma Court of Criminal Appeals. In that appeal Petitioner was represented by a new attorney, who raised nine propositions of error.[17] Petitioner and his attorney also jointly filed a "Supplemental Pro Se Brief of Appellant," raising additional propositions of error. However, the Court of Criminal Appeals found this supplemental brief to be improperly filed, and deemed the issues raised therein to

[17] The Petitioner's appellate counsel raised the following propositions of error. (1) the Petitioner's conviction of both rape and incest violated the double jeopardy clause of the Fifth amendment; (II) the admission of expert testimony that the alleged victim was truthful violated the Petitioner's right to a fair trial; (III) the trial court erred by allowing lay witnesses to testify regarding the alleged victim's capacity for truthfulness; (IV) the evidence presented was insufficient to prove that the Petitioner committed incest; (V) the trial court erred by failing to direct a verdict in the Petitioner's favor on the incest count; (IV) the trial court erred by refusing to give the Petitioner's requested jury instruction regarding the necessity of corroboration of the alleged victim's testimony; (VII) it was fundamental error to allow the state's expert to testify that the alleged victim suffered from post-traumatic stress disorder; (VIII) the Petitioner was denied effective assistance of trial counsel; and (IX) the Petitioner's sentences were excessive.

be waived on appeal.[18] In a summary opinion, the Oklahoma Court of Criminal Appeals granted relief to Petitioner as to his rape conviction, which was reversed, but denied any relief with respect to his conviction for incest. See Ives v. State, No. F-90-870 (Okla. Crim. App. Mar. 11, 1994).

On March 4, 1997, Petitioner filed an application for post-conviction relief in the Oklahoma County District Court. Petitioner raised nine propositions of error.[19] The district court held that all of Petitioner's claims, other than his claim that he was denied effective assistance of appellate counsel, had already been raised and rejected on direct appeal or could have been raised, and that they were therefore barred. Additionally, the court held that there was no evidence to suggest that Petitioner was denied effective assistance of appellate counsel and denied Petitioner's application for post-conviction relief. See Ives v. State, No. CF-89-4544 (Dist. Ct. Okla. Co. May 14, 1997). The Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief on January 13, 1998, for substantially the same reasons cited by the district court. See Ives v. State, No.

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[18] The Petitioner raised Ground Five (a) of his instant petition in that supplemental brief, and he expanded upon his arguments on two other propositions of error that he raised in his direct appeal brief.

[19] The Petitioner raised the following propositions of error: (I) his sentence was improperly enhanced; (II) he was punished twice for the same offense in violation of the Fifth Amendment; (III) & (VI) prosecutorial misconduct deprived him of a fair trial; (IV) the trial court erred by allowing expert and lay witnesses to testify regarding the alleged victim's capacity for truthfulness; (v) the trial court improperly instructed the jury; (VII) the accumulation of irregularities, errors and prosecutorial misconduct denied the Petitioner of a fair trial; (VIII) the prosecution withheld and concealed exculpatory evidence; and (IX) the Petitioner was denied effective assistance of both trial and appellate counsel.

PC-97-704 (Okla. Crim. App. Jan. 13, 1998). Petitioner then filed the instant petition on January 30, 1998.

The undersigned Magistrate Judge initially recommended denial of the petition, except for four issues upon which supplemental briefing was needed. Petitioner objected in part to the recommendation, and Respondent did not object. Judge Alley adopted the recommendation in its entirety. Upon re-referral, the undersigned recommended denial of relief for an alleged error in the admission of expert testimony vouching for the child victim's truthfulness. As to another issue, the need for an evidentiary hearing, the undersigned found in favor of the Petitioner, and recommended that a hearing be conducted on the remaining two issues. Judge Alley adopted that recommendation, and re-referred this matter for the purpose of conducting the hearing. The undersigned entered an order setting the matter for hearing on February 28, 2002.

The evidentiary hearing began on February 28, 2002, and concluded on March 1, 2002. Petitioner was present in person and by counsel on February 28, but waived his personal appearance and appeared only through counsel on March 1. Respondent appeared through counsel. During the hearing, Petitioner testified on his own behalf. He also called the following witnesses: Linda C. Bias, Dr. Irwin Hall III, Christine Ives, Sharisse L. O'Carroll, and Myrtle L. Edmond. Respondent called the Honorable Virgil C. Black, Charles T. (Thomas) Kite, and Larry Tedder.[20] Following the testimony of the witnesses and the introduction of exhibits, the hearing was concluded. At Petitioner's request, the undersigned gave both parties an opportunity to submit proposed

[20] Judge Black is a sitting state district judge in Oklahoma County.

findings of fact and conclusions of law.[21] Petitioner's proposed findings and conclusions have been filed, and so the matter is at issue.[22]

Summary of the Issues

Petitioner argues that his trial counsel was ineffective because he failed to call Ms. Laura Wilson, Petitioner's wife at the time and the victim's mother, as a witness for the defense.[23] Specifically, he alleges that Laura's testimony, if offered, would have severely undermined his daughter's credibility and bolstered that of Petitioner. He alleges that trial counsel promised Petitioner that Laura would be called to testify, and that trial counsel also referred to Laura's probable testimony in his opening statement. Petitioner claims that trial counsel's failure to call Laura was due to an undisclosed conflict of interest created by the fact that Laura was being represented by trial counsel's law partner in ongoing juvenile court proceedings in which the district

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[21] After the hearing, Petitioner filed a motion to supplement the record with relevant telephone directory listings. That motion is hereby granted, and the undersigned has considered the listings in reaching this recommendation. Petitioner himself filed a "Pro Se Statement of Facts to the Evidentiary Hearing." Although Petitioner is represented by counsel herein, that document has also been considered by the undersigned in preparing this report and recommendation.

[22] The undersigned gave respondent the option of responding to Petitioner's proposed findings and conclusions, but Respondent has indicated that a response will not be filed.

[23] Apparently Ms. Wilson was known by various last names during the relevant time period, so the parties at the evidentiary hearing typically referred to her as "Laura" so as to not confuse the witnesses. Therefore, the undersigned has also referred to her as "Laura" throughout this Report and Recommendation.

attorney's office "still held sway over her parental rights." He argues that trial counsel failed to call Laura to testify on Petitioner's behalf because it was not in Laura's interest to oppose the district attorney's office in any way. Thus, petitioner argues that trial counsel had an actual conflict of interest that deprived him of effective assistance of counsel.

Facts Established at the Hearing

Having observed the witnesses and heard their testimony, and having review the exhibits, the undersigned finds the facts to be as follows.

Prior to the criminal proceeding that resulted in the conviction attacked herein, Petitioner and his wife, Laura Wilson, were respondents in a juvenile court proceeding in which the state sought the adjudication of their daughter, as a deprived child. Hrg. Tr. Vol. 1, 8-9. The allegations in that juvenile proceeding were that the Petitioner had been involved in sexual misconduct with the daughter and that Laura had permitted such misconduct. Laura Wilson was represented in the juvenile proceeding by attorney Tom Kite. Hrg. Tr. Vol. 1, 10. Petitioner was represented by attorney Tom McCormack. Hrg. Tr. Vol. 1, 8. In that proceeding, the jury found the child to be a deprived child. Hrg. Tr. Vol. 1, 9. Thereafter, the Department of Human Services (DHS) required the child's mother, Laura Wilson, to complete a service plan. Hrg. Tr. Vol. 1, 182. The service plan consisted of things such as parenting skills classes and counseling. Hrg. Tr. Vol. 1, 188. If a parent does not complete the service plan, DHS will presume that conditions in the home have not changed and may move

to terminate parental rights. Hrg. Tr. Vol. 1, 188. Petitioner was charged with criminal conduct as a result of the accusations made by the child, and the juvenile proceeding was not put on hold as to Petitioner. Hrg. Tr. Vol. 1, 9, 24.

Laura Wilson was never charged criminally. Hrg. TR. Vol. 1, 185. Laura's attorney, Tom Kite, testified that he did not believe that Laura was vulnerable to criminal charges as a result of the events which were subject of the juvenile proceeding. Hrg. Tr. Vol. 1, 185. The district attorney never told Mr. Kite that he was considering criminal charges against Laura, and there was never any "deal" offered with respect to Laura. Hrg. Tr. Vol. 1, 185-86.

After criminal charges were brought, Petitioner was arrested and held in the Oklahoma County Jail. Hrg. Tr. Vol. 1, 9. While there he was visited by his mother, who was accompanied by Don Halbrook and attorney Larry Tedder. Hrg. Tr. Vol. 1, 9-10. The purpose of the meeting was to discuss the possibility of Mr. Tedder representing Petitioner in the criminal proceeding. Hrg. Tr. Vol 1, 9-10. According to Petitioner, at that meeting, Mr. Tedder told Petitioner that he was in the same firm with Laura Wilson's attorney in the juvenile proceeding, Tom Kite. Hrg. Tr. Vol. 1, 10. Mr. Tedder told Petitioner that he had access to Mr. Kite and to the juvenile proceeding records, and that he could discuss the case with Mr. Kite and to the juvenile proceeding records, and that he could discuss the case with Mr. Kite and coordinate the criminal and juvenile court proceedings. Hrg. Tr. Vol. 1, 10-11; Vol. 2, 273. Mr. Tedder represented Petitioner in the criminal case. Hrg. Tr. Vol. 1, 9.

At the time Petitioner retained Mr. Tedder to represent him in the criminal proceeding, Laura Wilson was still supportive of Petitioner. Hrg. Tr. Vol. 2, 219. Accordingly, Laura Wilson and Mr. Tedder met in the months leading up to the criminal trial, and she helped provide Mr. Tedder with background information about the case. Hrg. Tr. Vol. 2, 219, 253. Laura had given testimony at the juvenile proceeding that was generally favorable to Petitioner; she corroborated a physical condition that allegedly limited the Petitioner's ability to committed the sexual acts in the manner described by the child, confirmed that Petitioner and Laura maintained separate residences during the time the acts were allegedly committed, and testified that the child had a secretive relationship with her male softball coach during the period in question. Hrg. Tr. Vol. 1, 18; Hrg. Tr. Vol. 2, 275-76.

However, a few weeks prior to the trial, Laura Wilson stopped contacting Mr. Tedder, and would not return his telephone calls. Hrg. Tr. Vol. 2, 219, 278. Mr. Tedder asked Mr. Kite about Laura Wilson's failure to continue her past cooperation, and Mr. Kite told Mr. Tedder that Laura had changed her attitude and was no longer supportive of Petitioner. Hrg. Tr. Vol. 2, 246, 260, 278. Laura also stopped visiting Petitioner at the jail around Thanksgiving before his trial in February. Hrg. Tr. Vol. 1, 23. Both Mr. Kite and Dr. Irwin Hall testified that it is not uncommon for a wife whose husband is accused of sexually abusing their child to start out supportive of the husband, but then begin to believe the child and become angry and hostile toward the husband. Hrg. Tr. Vol. 1, 82-83, 186.

As soon as Mr. Tedder learned of Laura Wilson's change in attitude, he decided not to call her as a witness

in the criminal proceeding. Hrg. Tr. Vol. 2, 219, 221. Although Laura Wilson's record testimony at the juvenile proceeding was available to impeach her on some points should trial testimony be damaging to Petitioner, Mr. Tedder considered Laura to be a "very dangerous witness." Hrg. Tr. Vol. 2, 265, 270-71, 276-78. According to Mr. Tedder, one of the primary benefits of Laura's testimony to Petitioner's case was to give the jury the perception that Laura was supportive of Petitioner. Hrg. Tr. Vol. 2, 268, 277. Once Laura's attitude was no longer supportive, that strategic advantage disappeared. Id. Mr. Tedder believed that if he called Laura as a witness, she would do everything she could to harm Petitioner. Hrg. Tr. Vol. 2, 241. Moreover, Mr. Tedder believed that any corroboration that Laura could provide as to some factual matters was outweighed by the fact that Laura now believed her daughter. Hrg. Tr. Vol. 2, 265, 276-78. Dr. Irwin Hall testified that it was not uncommon for wives to start out supportive of a husband accused of incest, and then later "turn" on their spouses. Hrg. Tr. Vol. 1, 82-83. He also agreed that the wife is "not pleasant" to have as a witness in that situation. Hrg. Tr. Vol. 1, 82-83. Mr. Kite testified similarly, stating that 80-85% of women initially deny their husband's wrongdoing, and then changes occur so that they are extremely angry toward the spouse. Hrg. Tr. Vol 1, 183-84. When asked whether Laura became hostile toward Petitioner before trial, Mr. Kite stated that "hostile" was "understating her feelings at that time." Hrg. Tr. Vol. 1, 184. Upon questioning by Petitioner's counsel, Mr. Kite also expressed his opinion that impeaching a witness can so anger a jury that the attorney calling that witness must carefully weigh that risk against the importance of the testimony. Hrg. Tr. Vol. 1, 203-04. He also indicated that the value of Laura's testimony should be considered in light of the result in

the juvenile proceeding: "if it didn't fly one time, why would you expect it to fly a second time." Hrg. Tr. Vol. 1, 204.

Instead of calling Laura to testify about the impact of Petitioner's disability on his ability to have sexual relations in the missionary position, Mr. Tedder called a medical doctor to corroborate Petitioner's claim. Hrg. Tr. Vol. 2, 277. However, the district attorney tried to impeach the doctor's testimony by suggesting that only Petitioner's spouse would know how he could perform. Hrg. Tr. Vol. 2, 242. Laura's testimony that she and Petitioner maintained separate residences did not completely rule out access to the child, and, moreover, could be countered by Laura's testimony at the juvenile proceeding that he daughter walked to Petitioner's home each day after school. Hrg. Tr. Vol. 2, 265. As to Laura's testimony regarding her daughter's relationship with her softball coach, Mr. Tedder did not believe that he could get that evidence admitted at the criminal trial due to the rape shield law. Hrg. Tr. Vol. 2, 247.

At the time of the juvenile and criminal proceedings Tom Kite and Larry Tedder shared office space. Hrg. Tr. Vol. 1, 181. They were not partners. Id. Mr. Kite, Mr. Tedder, and the other attorneys who shared the space each contributed an equal amount to an overhead fund, from which expenses were paid. Hrg. Tr. Vol. 2, 273. They did not share fees, kept their active client files separate, and did not share confidential client information. Hrg. Tr. Vol. 2, 272-73, 275. The nature of their practice was such that secretaries did not have mutual access to each attorney's confidential client information. Hrg. Tr. Vol. 1, 163. Each attorney who had an office in the same suite had his or her name painted on the glass door that separated he reception area from the

building's hallway. Hrg. Tr. Vol. 1, 196. They also shared letterhead stationary that had the attorney's names. Id. They had one main telephone line, but each attorney had his or her own separate office. Id., Hrg. Tr. Vol. 1, 198, 200. Although the Oklahoma Legal Directory (the "Bluebook") had an individual listing for each attorney that in some instances was followed by a listing of all lawyers who shared the same office space, Mr. Tedder and Mr. Kite both testified at the hearing that they were unaware of the listing, and so made no effort to correct any inference that they were associated as a firm. Hrg. Tr. Vol. 1, 197-98, Hrg. Tr. Vol. 2, 230. Petitioner's mother and sister assumed Mr. Tedder and Mr. Kite were in the same firm because their names were on the door. Hrg. Tr. Vol. 1, 63, 69-70, 89-90. Petitioner's aunt just assumed Mr. Kite and Mr. Tedder were part of the same firm based upon discussion with the family. Hrg. Tr. Vol. 1, 173, 175-76. Her belief was not based upon anything Mr. Tedder said. Hrg. Tr. Vol. 1, 175-76. Dr. Irwin Hall testified that he also believed that Mr. Tedder and Mr. Kite were in the same firm, and thought Mr. Tedder had referred to Mr. Kite as "his partner." Hrg. Tr. Vol. 1, 80-81. During voir dire at the criminal proceeding, the trial judge asked Mr. Tedder to identify the other members of his "firm." Hrg. Tr. Vol. 2, 233. Mr. Tedder named the other attorneys with whom he shared office space. Id. He did not attempt to set forth the exact legal relationship between the attorneys because that was not germane given the purpose of trial judge's question. Hrg. Tr. Vol. 2, 266. In conversations with a layperson, Mr. Tedder might have referred to another attorney in the office as "my office partner." Hrg. Tr. Vol. 2, 259.

In handling Petitioner's case, Mr. Tedder shared no confidential information with Mr. Kite. Hrg. Tr. Vol.

2, 275. The nature of his discussions with Mr. Kite about the case was not affected by the fact that they shared office space. Id. The conversations were no different than they would have been had Mr. Kite's office been "six block or six miles" away. Id. Mr. Tedder would have attempted to have the same type of conversations with any lawyer representing Laura, whether he knew the lawyer or not. Hrg. Tr. Vol. 2, 279.

In his opening statement at the criminal trial, MR. Tedder discussed what he believed Laura's testimony would be. Hrg. Tr. Vol. 1, 26-27; Hrg. Tr. Vol. 2, 249-50. Although Mr. Tedder had already decided not to call Laura, it was his belief that the prosecution might call her as a witness. Hrg. Tr. Vol. 2, 250. Petitioner and his sister, aunt, and mother testified that on the next to the last day of trial, Mr. Tedder asked Petitioner to come up with a list of questions to ask Laura. Hrg. Tr. Vol. 1, 28, 67, 69, 96, 174. Dr. Hall testified that Mr. Tedder also asked Hall to assist him in coming up with questions for Laura in the week before trial began. Hrg. Tr. Vol. 1, 81-82. However, Mr. Tedder testified that he did not recall asking for help in developing questions for Laura, and that he would never seek a lay person's assistance in coming up with questions to be asked of a witness at trial. Hrg. Tr. Vol. 2, 248, 274. He testified that Petitioner may have given him such a list, but that it was not requested. Id. Although Petitioner, his sister, his mother, and his aunt all testified that they were surprised to learn on the last day of trial that Mr. Tedder was not going to call Laura, Mr. Tedder testified that he had informed Petitioner and probably Petitioner's family of that decision the weeks before trial. Hrg. Tr. Vol. 1, 29, 67, 174; Hrg. Tr. Vol. 2, 221, 249.

Although Petitioner claimed that he wrote a letter to the trial judge after the verdict but before sentencing, complaining about Mr. Tedder – especially with regard to Mr. Tedder's decision to not call Laura as a witness – and had shown it to Mr. Tedder before sentencing, Mr. Tedder testified that he did not recall such a letter. Id. Petitioner produced no such letter at the hearing, and stated that it was probably "somewhere on the farm." Hrg. Tr. Vol. 1, 59-60. He also admitted that the letter had not been attached to any of his post conviction proceedings. Id.

Mr. Tedder testified that his decision not to call Laura was based upon his judgment as to what was in the best interests of his client. Hrg. Tr. Vol. 2, 252. He further testified that he had no concern about Laura's legal status, and that he would have called her without hesitation if he believed it would benefit the Petitioner. Hrg. Tr. Vol. 2, 252-53.

Legal Analysis

The Sixth Amendment right to effective assistance of counsel includes the "right to representation that is free from conflicts of interest." United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990) (quoting Wood v. Georgia, 450 U.S. 261, 271 (1981). Under Strickland v. Washington, 466 U.S. 668 (1984), a petitioner who seeks to establish a claim of ineffective assistance of counsel must normally demonstrate both that counsel's performance fell below an objective standard of reasonableness and that the Petitioner suffered prejudice as a result thereof. Id. at 694. However, a somewhat different standard applied when a claim of ineffective assistance of counsel is based on an alleged conflict of interest. Where, as here, there has been no timely

objection at trial, Petitioner cannot prevail unless he demonstrates " that counsel actively represented conflicting interest and that an actual conflict of interest adversely affected his lawyer's performance." Bryan v. Gibson, 276 F.3d 1163, 1172 (10th Cir. 2001) (quoting Burger v. Kemp, 483 U.S. 776, 783 (1987)); see also Culver v. Sullivan, 446 U.S. 335, 350 (1980) (a petitioner must demonstrate "that an actual conflict of interest adversely affected his lawyer's performance."). "The mere possibility of a conflict, however, is insufficient." Bryan, 276 F.3d at 1173.

Turning first to the "actual conflict" element, one attorney's simultaneous representation of two clients with interests in the same litigation can create the potential for a conflict of interest. See Comment to Rule 1.7, Oklahoma Rules of Professional Conduct, Okla. Stat. Tit. 5, Ch. 1, App. 3-A. Likewise, multiple representation by lawyers in the same firm can result in an imputed disqualification on conflict of interest grounds.[24]

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[24] The threshold inquiry appears to be whether the attorneys have held themselves out to be or conducted themselves as a firm. When lawyers not only share office space, but also use common letterhead claiming that they are "an association of attorneys at law," they have been found to be a law firm for the purpose of the imputed disqualification rule. United States v. Cheshire, 707 F.Supp. 235, 241 (M.D. La. 1989) (lawyers who are not actually associated are members of a "law firm" for the purposes of Rule 1.10, without regard to whether the lawyers shared information or knowledge); Tennessee v. Bryan, No. M1999-00854-CCA-R9-CD, 2000 WL 1131890, at *1, 8 (Tenn. Crim. App. Aug. 4, 2000) (maintenance of separate practices not determinative where two attorneys share a joint advertisement in "Yellow Pages," listing their names, the same area of practice, and one telephone number.) Where the attorneys have not held themselves out as a law firm, other factors are considered, such as whether the physical organization and actual operation of the office space is such that the confidential client information of each lawyer is secure from the others. See Restatement (Third) of Law Governing Lawyers § 203, cmt. E (1996).

Oklahoma Rules of Professional Conduct, Rule 1.10, Okla. Stat. Tit. 5, Ch. 1, App. 3-A: "(a) While layers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited by doing so by Rules 1.7, 1.8, 1.9 or 2.2." The comment to the rule explains the principle involved:

> The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applied to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated . . . .

Okla. R. Prof. Conduct, Rule 1.10, cmt. (West 2001).

However, because joint representation of co-defendants creates a potential conflict of interest, it "is not *per se* violative of constitutional guarantees of effective assistance of counsel." Burger v. Kemp, 483 U.S. 776, 783 (1987) (quoting Holloway v. Arkansas, 435 U.S. 475, 482 (1978)). In Burger, counsel represented petitioner, and his partner was appointed to represent the petitioner's co-defendant in his later, separate trial. Id. at 780-81. The petitioner's counsel assisted his partner in the defense of the petitioner's co-defendant. Id. at 781. The two shared research and discussed the cases with one another. Id. Although the petitioner was arguably the less culpable of the two defendants, at trial each defendant sought to emphasize the culpability of the other in order to avoid the death penalty. Id. at 779, 781.

The petitioner's counsel prepared briefs for both the petitioner and his co-defendant on their second appeal. Id. at 784.

"Assuming without deciding that two law partners are considered one attorney," the Supreme Court nonetheless agreed with the lower court's conclusion that there was no actual conflict of interest. Burger, 483 U.S. at 783. Noting that defendant may actually benefit from joint efforts of two partners, the Court cited the presumption that "the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client." Id. at 783 – 84. The Court also stated that the separate trials in that case significantly reduced the potential that the interest of the petitioner and his co-defendant would diverge. Id.

The Court rejected the petitioner's effort to show an actual conflict by his counsel's failure to make the "lesser culpability" argument in the appeal brief: "Given the fact that it was the petitioner who actually killed [the victim] . . . the decision to forgo this issue had a sound strategic basis." Id. Additionally, the Court found that "determining that there was an actual conflict of interest requires the attribution of [counsel's] motivation for not making the 'lesser culpability' argument to the fact that his partner was [the co-defendant's] lawyer, or to the further fact that he assisted his partner in that representation." Id. at 784-85. The Court refused to substitute its speculation for the trial court's finding that counsel was not motivated by the fact that his partner was the co-defendant's lawyer. Id. at 785.

In a case just handed down yesterday by the Supreme Court, it was again emphasized that the "purpose of out Holloway and Sullivan exceptions from

the ordinary requirements of Strickland, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure vindication of the defendants Sixth Amendment right to counsel." Mickens v. Taylor, No. 00-9285, 2002 WL 459251 (U.S. Mar. 27, 2002). After noting that some Courts of Appeals had "applied Sullivan 'unblinkingly' to 'all kinds of alleged attorney ethical conflicts," the Supreme Court stated:

It must be said, however, that the language of Sullivan itself does not clearly establish, or indeed even support, such expansive application. "Until," it said, "a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. (quoting Sullivan, 446 U.S. at 350) (emphasis added by Mickens).

Thus, under the teaching of Burger and Mickens, petitioner here must show more than an imputed disqualification. Even if his trial counsel was a member of the same law firm as counsel for Laura, such would not per se constitute ineffective assistance of counsel. Petitioner must show that an actual conflict of interest existed. "Thus our inquiry is not whether a state disciplinary rule for lawyers has been violated by [counsel]. But whether, everything considered, Appellant's counsel 'actively' represented conflicting interests." United States v. Gallegos, 39 F.3d 276, 278 (10th Cir. 1994) (emphasis in original); see also United States v. Sabbach, 98 F.Supp.2d 680, 692 (D.Md. 2000) ("It might be that the potential for conflict arguably violated some disciplinary rule, but that is not the question . . . ."). The undersigned concludes that

Petitioner has not shown that his counsel actively represented conflicting interests here.

Here, Laura and Petitioner were not co-defendants in the criminal proceeding. Although Laura and Petitioner had both been respondents in the juvenile proceeding, and Laura was completing a service plan as a result of that proceeding, there was no sharing of confidential information between Mr. Kite and Mr. Tedder. Mr. Tedder was convincing in his testimony that any information he shared with Mr. Kite was exactly the same information that he would have shared with any attorney representing Petitioner's wife in the juvenile proceeding. He was also believable when he testified that he would have not hesitated to call Laura as a witness if he thought that strategy would have benefited Petitioner. However, it was Mr. Tedder's belief that the primary advantage to be gained from calling Laura had been lost due to her change in attitude toward Petitioner. Mr. Tedder decided not to not call Laura when she stopped cooperating with him and refused to return his telephone calls. Based on his belief that Laura, if called as a witness, would do anything she could to harm Petitioner, Mr. Tedder made a strategic decision not to call her as a defense witness. There was no evidence that his decision was in any way attributable to the fact that Mr. Kite represented Laura in the juvenile proceeding.

Even if Petitioner has shown that Mr. Tedder actively represented conflicting interests, he did not show that such adversely affected his lawyer's performance. "[D]efense counsel's performance [is] adversely affected by an actual conflict of interest is a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal

interests." United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990); see also United States v. Rodriguez Rodriguez. 929 F.2d 747 (1st Cir. 1991) (adverse effect shown where plausible alternative strategy not undertaken due to inherent conflict). The term "alternative defense strategy" does not embrace all possible courses of action open to a defense attorney; instead, it refers to those which a zealous advocate would reasonably pursue under the circumstances. See Lopez v. Scully, 58 F.3d 38, 42 (2d Cir. 1995).

The "alternative defense strategy" identified by Petitioner was calling Laura as a defense witness. Although his strategy might be plausible, Mr. Tedder believed it was more reasonable not to call Laura in light of her probable change in attitude toward Petitioner. Moreover, Mr. Tedder's decision was not based upon any inherent conflict in the positions of Petitioner and Laura. It is Petitioner's position that Laura's favorable testimony at trial would have exposed her to the risk that DHS would move to terminate her parental rights. However, Mr. Tedder's strategy was based upon his belief that Laura's testimony *would not be favorable.* Accordingly, Laura's testimony would have had no adverse affect on her legal position, and there was not benefit to her from Mr. Tedder's decision not to use her as a defense witness. There was, however, considerable risk to Petitioner if Laura was called as a witness – it would have been clear to the jury that Laura no longer supported Petitioner, despite Petitioner's opportunity to perhaps impeach her testimony from the testimony she gave during the juvenile proceeding. Thus, there was no inherent conflict between their positions.

As stated by the Eleventh Circuit, a petitioner must show three things to prove adverse effect: (1) that

his counsel could have pursued a plausible alternative strategy; (2) that the alternative strategy was reasonable; and (3) that the strategy was not followed because it conflicted with counsel's external loyalties. Reynolds v. Chapman, 253 F.3d 1337, 1343 (11th Cir. 2001). Even if the first two of these elements are satisfied here, the third is not. Petitioner cannot show that Mr. Tedder's performance was adversely affected by a conflict of interest. Accordingly, the undersigned recommends denial of the petition on the ground that Petitioner's Sixth Amendment right to the effective assistance of counsel was violated because of a conflict of interest.

Ineffective Assistance of Trial Counsel

As there was no actual conflict of interest that adversely affected counsel's representation of Petitioner, the undersigned will turn to Petitioner's general claim of ineffective assistance. As noted above, the familiar standard set forth in Strickland v. Washington, 466 U.S. 668, 687-688 (1984), governs ineffective assistance of counsel claims. The two-part Strickland test requires Petitioner to show both constitutionally deficient performance and prejudice. Id. at 694. To show constitutionally deficient performance, a petitioner must show that his attorney "committed serious errors in light of prevailing professional norms such that his legal representation fell below an objective standard of reasonableness." Castro v. Ward, 138 F.3d 810, 829 (10th Cir. 1998) (quotations omitted). Counsel's performance must have been completely unreasonable not merely wrong. Hoxsie v. Kerby, 108 F.3d 1239, 1246 (10th Cir. 1997). In determining whether Petitioner has made this showing, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance" and should grant relief only if the challenged conduct cannot, under the circumstances, "be considered sound trial strategy." Strickland, 466 U.S. at 689. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). To show prejudice, Strickland requires a petitioner to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

The evidence shows that counsel's decision not to present Laura as a defense witness was sound trial strategy, and was not unreasonable given Laura's probable hostile attitude. Whether or not to call a witness is generally a tactical decision within the discretion of trial counsel. Jackson v. Shanks, 143 F.3d 1313, 1320 (10th Cir. 1998). Mr. Tedder had considerable criminal trial experience, and at the hearing articulated sound reasons for his decision not to call Laura – reasons that were supported by testimony of other witnesses at the hearing.

In light of the inherent strategic nature of such decisions, the very real risks posed by Laura's hostile attitude, and the ability to get helpful facts through other witnesses, Mr. Tedder's decision not to call Laura fell within the wide range of reasonable professional assistance. As the first prong of the Strickland test is not met, there is not need to consider whether the decision not to call Laura was prejudicial.

Recommendation

For these reasons, the undersigned recommends that the petition for a writ of habeas corpus be denied. The parties are advised of their right to file an objection to this Report and Recommendation with the Clerk of

this Court by April 17th, 2002, in accordance with 28 U.S.C. § 636 and Local Civil Rule 72.1. The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal questions contained herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991). This Report and Recommendation disposes of all the issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 28th day of March, 2002.

DOYLE W. ARGO
UNITED STATES MAGISTRATE JUDGE

SUPPLEMENTAL APPENDIX D –
DISTRICT COURT ORDER DATED
OCTOBER 7, 2002

SUPPLEMENTAL APPENDIX D

IN THE WESTERN DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY CARL IVES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-98-363-A**
	)	
BOBBY BOONE, Warden,	)	
	)	
Respondent.	)	

ORDER

This matter is before the court for review of the Report and Recommendation of United States Magistrate Judge Doyle W. Argo issued March 28, 2002. The Report concerns two remaining claims raised by the petition under 28 U.S.C § 2254.[25] These claims were the subject of an evidentiary hearing conducted by Judge Argo on February 28 and March 1, 2002. Based on the existing record, evidence presented at the hearing, and written arguments of counsel, Judge Argo recommends denial of petitioner's claims that he received constitutionally ineffective assistance of counsel during his state court criminal trial due to (1) counsel's failure to call Laura

[25] The petition has been the subject of three previous reports of the magistrate judge issued September 21, 1998, September 15, 2000, and October 25, 2001; and three orders adopting those reports. (Orders of Oct. 15, 1998; Dec. 7, 2000; Dec. 18, 2001.)

Wilson as a defense witness and (2) the existence of a conflict of interest that adversely affected counsel's performance. The Court must make a de novo determination of specific issues raised by petitioner's timely objections. See 28 U.S.C § 636(b)(1); Fed. R. Civ. P. 72(b).[26]

Petitioner seeks relief from a 1990 conviction of incest after former conviction of two or more felonies, and a prison sentence of 80 years. Petitioner was accused of sexually abusing his daughter, Wendy, beginning in 1985 and continuing intermittently until 1989.[27] His trial defense was that Wendy, who was then fourteen years old, had fabricated the allegations. Wendy was raped in 1984 by another man, a friend of her stepfather, and after this event, she began exhibiting emotional and

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[26] As with previous objections, the Court has received separate submissions from petitioner and his retained counsel. Petitioner has made numerous other filings for himself, including a "Pro Se Formal Complaint Against State Witness Larry Tedder," a motion to deem that complaint confessed, and a "Pro Se Motion for the Court to Issue an Order to Retrieve Records from the Oklahoma Administrative Office of the Court." His attorney also has filed motions, one requesting consideration of petitioner's pro se objection and complaint against Larry Tedder and another requesting oral argument on the objections. Finally, at the Court's request, respondent has filed a response to petitioner's objections, to which petitioner has replied pro se. The Court has considered all of these materials, and rules on pending motions below.

[27] The information as amended at trial used a later starting date due to the statute of limitations. (Jury Trial Tr. At 271-73, 755.) The three-count information included charges of first-degree rape, forcible sodomy, and incest. The sodomy allegedly occurred during a shorter time period, from October 1988 until 1989. The jury acquitted petitioner of the sodomy charge but found him guilty of rape and incest. The Oklahoma Court of Criminal Appeals found the convictions of both rape and incest to be duplicitous and vacated the rape conviction and its concomitant prison sentence of 40 years.

behavioral problems. In 1987, Wendy first made allegations of sexual abuse by petitioner that were not pursued because she recanted. At trial, the defense sought to portray Wendy as a troubled adolescent who resented her father's delayed involvement in her life and his discipline.[28] Petitioner also presented defenses of lack of opportunity (he did not live in the same house with Wendy and was incarcerated for four months in 1986) and physical incapacity (he suffered several accidental injuries, including a gunshot wound to his right arm in February 1988, that allegedly rendered him incapable of engaging in sexual intercourse in the manner claimed by Wendy). The outcome of the trial hinged on the jury's credibility assessments; no forensic evidence was presented.

Before the criminal case was filed, Wendy's allegations against petitioner had been the subject of state juvenile proceedings against him and Wendy's mother, Laura, who was then married to petitioner.[29] All three interested parties in that proceeding (Wendy, Laura and petitioner) testified during a jury trial of the juvenile court charges, which resulted in a determination, that Wendy was a deprived child. Laura was represented by Tom Kite, an attorney who shared office space with petitioner's criminal defense lawyer, Larry Tedder. Mr. Tedder was hired to defend petitioner against the

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[28] Petitioner did not publicly acknowledge paternity of Wendy until she was eight or nine years old and did not become involved in her parenting until she became ten or eleven.

[29] Laura's marriage to petitioner followed her divorce from a man named Carl Wilson, and she continued to use the last name Wilson. She was referred to throughout the criminal trial and the evidentiary hearing simply by her first name, and the Court adopts this convention.

criminal charges; he did not represent petitioner during the earlier juvenile proceeding.[30]

MR. Tedder did not call Laura to testify as a defense witness during the criminal trial, even though he mentioned her anticipated testimony during arguments on pretrial motions, jury selection and his opening statement. Witnesses he did call were: A licensed counselor who testified about petitioner's psychological profile and Wendy's diagnosis; a medical doctor who testified about his treatment of petitioner's injuries and petitioner's physical condition during 1997 and 1998; and petitioner's aunt, Myrtle Edmond, a counselor with whom Wendy informally discussed her emotional problems and in whom Wendy confided. Petitioner also testified in his own defense.

Petitioner's pending claims for habeas relief – ineffective trial counsel due to failure to call Laura as a defense witness and a conflict of interest – were raised on direct appeal and summarily rejected by the Oklahoma Court of Criminal Appeals. This summary disposition is an "adjudication on the merits" that is entitled to deference under 28 U.S.C. § 2254(d). *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999). However, petitioner did not receive an evidentiary hearing on these claims in state court proceedings, *id.* § 2254(e)(2), and because he made allegations that, if true, would entitle him to relief, *Mayes v. Gibson*, 210 F.3d 1284, 1287 (10th Cir.), *cert. denied*, 531 U.S. 1020 (2000), he was afforded an evidentiary hearing by Judge Argo, which is discussed below.

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[30] Petitioner was represented in the juvenile proceeding by attorney Thomas McCormick.

ALLEGED VIOLATION OF THE RULE OF SEQUESTRATION

Before discussing the substance of Judge Argo's Report, the Court will address a procedural issue that came up after the report was issued – an alleged violation of the rule of sequestration invoked by petitioner's counsel at the start of the evidentiary hearing. Petitioner has filed a "Pro Se Formal Complaint Against State Witness Larry Tedder for a Violation of Title 28 U.S.C.A., Rule 615, an Offense in Violation of Magistrate Judge Argo's Sequestration Order." By this filing, petitioner complains that Mr. Tedder's testimony at the hearing reveals that he discussed the case with Laura while he was waiting outside the courtroom to be called as a witness. Petitioner alleges that he was prejudiced by this apparent violation of "the Rule" and asks that an appropriate sanction be assessed against Mr. Tedder "to include, if deemed allowable by the Court, striking his testimony" from the record. (Pro Se Formal Complaint, at 6.) The Court denies this request for two reasons.

First, the Court finds no rule violation. Judge Argo's sequestration order did extend the dictates of Rule 615, which provides for exclusion of witnesses, and direct excluded person "not to discuss your testimony with anybody other than the attorneys in the case." (Hr'g Tr. At 6.) Rule 615 provides exceptions, however, and two arguably apply here. The rule does not authorize exclusion of a party or a person whose presence is "essential to the presentation of a party's cause." Fed. R. Evid. 615(3). In my view, when an attorney's former client accuses him of incompetence through a claim of ineffective assistance of counsel, the attorney is the real party in interest, even though the State or custodial officer appears as the named respondent. At the least, the

accused attorney is essential to the State's defense against the ineffective assistance claim. I would permit, and actually have permitted, an accused attorney to remain in the courtroom during a hearing on an ineffective assistance of counsel claim and, if requested, to sit at counsel table with the respondent's attorney. For these reasons, Mr. Tedder need not have been excluded from the courtroom at all and was not prohibited from discussing the case with other persons.

Second, if a violation occurred, the sanction sought by petitioner would be unwarranted. When a witness violates a sequestration order, a trial court has discretion to exclude the witness's testimony, but "the witness generally should not be disqualified," particularly when there has been no suggestion that the party who sponsored the witness "knew of, or in bad faith allowed" the violation. *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975, 980 (10th Cir. 1996); *United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978). Also, because petitioner made no contemporaneous objection but raised this issue only on review, the burden rests on him to show that the alleged violation caused him "probable prejudice." *Burks*, 81 F.3d at 980; *United States v. Pritchard*, 781 F.2d 179, 183 (10th Cir. 1986); *see United States v. Salcido-Luzania*, No. 97-2399, 1999 WL 176130 at *6 (10th Cir. March 31, 1999). The Court is unpersuaded by petitioner's argument that he was prejudiced by Mr. Tedder's alleged discussion of the case with Laura, who was not a witness at the hearing. The extent and nature of their alleged conversation is unknown. The only apparent effect is that it enabled Mr. Tedder to opine during his testimony that he made a "good decision" when he elected not to call Laura as a defense witness during petitioner's criminal trial. Whether in retrospect this tactical decision was a good or bad one if not an issue in this case.

STANDARD OF DECISION

Petitioner urges the Court to fulfill its obligation to make a de novo determination of the issues addressed in the Report and Recommendation by rejecting Judge Argo's factual findings and by substituting its own findings in their place. This the Court declines to do. The de novo standard imposed by § 636(b)(1) requires a new determination, not a new hearing. The statute is designed "to permit whatever reliance a district judge, in the exercise of sound judicial discretion, [chooses] to place on a magistrate judge's proposed findings and recommendations." *United States v. Raddatz*, 447 U.S. 667, 676 (1980); *see Andrews v. Deland*, 943 F.2d 1162, 1170 (10th Cir. 1991). Here, the Court has performed its duty of de novo review by considering the actual testimony and evidence received at the hearing and other relevant portions of the record, including complete transcripts of the state court criminal and juvenile court trials. *See Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 724 (10th Cir. 1993); *Andrews*, 943 F.2d at 1170. For the reasons discussed more fully below, the Court finds that the pertinent factual findings made by Judge Argo are reasonable ones, fully supported by the evidence, and sufficient to permit disposition of petitioner's remaining claims without taking any more evidence or revisiting Judge Argo's credibility choices.

Concerning the merits of Judge Argo's ultimate conclusion that petitioner is not entitled to relief, the parties agree on the appropriate standard of decision by the Court. Petitioner must establish that the state court's rejection of his claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the

Supreme Court." 28 U.S.C. § 2254(d)(1). Relief may be granted, therefore, if "the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law; decided the case differently than the Supreme Court has on a set of materially indistinguishable facts; or unreasonably applied the governing legal principle to the fact of [petitioner's] case." *Elliot v. Williams*, 248 F.3d 1205, 1207 (10th Cir.), *cert. denied*, 122 S. Ct. 286 (2001). Under the "unreasonable application" clause, the test is one of objective reasonableness. Williams v. Taylor, 529 U.S. 362, 413 (2000).

Although the state court's adjudication of the claims at issue is a summary one, federal courts "owe deference to the state court's result, even if its reasoning is not expressly stated." *Aycox*, 196 F.3d at 1177. Under this rule, "it [is] left to the federal courts to articulate an appropriate rationale for the OCCA's summary decision." *Willingham v. Mullin*, 296 F.3d 917, 925 (10th Cir. 2002). "[W]e will uphold the Oklahoma appellate court's result . . . if our independent review persuades us the decision was not contrary to or an unreasonable application of clearly established federal law, or based upon an unreasonable determination of the facts in light of the evidence presented." *Hawkins v. Mullin*, 291 F.3d 658, 674 (10th Cir. 2002) (quoting *Walker v. Gibson*, 228 F.3d 1217, 1241 (10th Cir. 2000), *cert. denied*, 533 U.S. 933 (2001)); *Aycox*, 196 F.3d at 1178. Since petitioner did not receive a hearing in state court on his claims, however, any implicit factual findings of the state court are not entitled to deference. *Mayes*, 210 F.3d at 1289.

CONFLICT OF INTEREST

Petitioner claims that Mr. Tedder had a conflict of interest arising from his law practice that adversely affected his representation of petitioner. Specifically petitioner alleges that Mr. Tedder was in a law form with Laura's attorney, that petitioner and Laura had conflicting interests at the time of his state court trial, and that this conflict affected Mr. Tedder's decision whether to call Laura as a witness. This claim first surfaced on direct appeal; it was not raised at trial. The two-part analysis *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980), applies to a conflict of interest claim that was not raised at trial. *See Mickens v. Taylor*, 122S. Ct. 1237, 1243-44 (2002); *United States v. Alvarez*, 137 F.3d at 1251-52. "An actual conflict of interest results if counsel was forced to make choices advancing other interests to the detriment of his client. Id., at 1252; *Bryan v. Gibson*, 276 F.3d 1163, 1173 (10th Cir. 2001). "[T]o demonstrate an actual conflict of interest, the petitioner must be able to point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party." *Alvaraz*, 137 F.3d at1252 (quoting *Danner v. United States*, 820 F.2d 1166, 1170 (11th Cir. 1987)); *United States v. Martin*, 965 F.2d 839, 842 (10th Cir. 1992). An attorney's performance is adversely affected by a conflict of interest "if a specific and seemingly valid or genuine defense strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or his own personal interests." *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990).

Much of the evidence presented at the evidentiary hearing before Judge Argo went to the issue of whether Messrs, Tedder and Kite were members of a "law firm" such that the rule of implied disqualification should apply. To prevail, however, petitioner must show "that

counsel actively represented conflicting interests." *Burger v. Kemp*, 483 U.S. 776, 783 (1987); *Bryan*, 276 F.3d at 1172. Application of an ethical rule imputing representation of a firm's clients to all lawyers in the firm is insufficient alone to meet this burden. *See United States v. Gallegos*, 39 F.3d 276, 278-79 (10th Cir. 1994) (violation of disciplinary rule does not establish actual conflict). Judge Argo did not decide this issue but instead assumed that the two lawyers might have belonged to a "firm." (3/28/02 Report and Recom. At 16). The Court agrees with this approach and similarly finds it necessary to address this issue.

Joint representation of two parties by an attorney creates a potential conflict of interest but, by itself, does not establish an actual conflict. *Burger*, 483 U.S. at 783. "A conflict does not arise unless "the interests of [the third party] and defendant [are] divergent in the current litigation, such that the [third party] has an interest in the outcome of the particular case at issue that is adverse to that of the defendant." *Bryan v. Gibson*, 276 F.3d at 1175 (quoting *Hale v. Gibson*, 227 F.3d 1289, 1313 (10th Cir. 2000), cert. denied, 533 U.S. 957 (2001)). Thus petitioner must show that both he and Laura had adverse or at least inconsistent interests in the criminal case and that Mr. Tedder was, in that case, advancing her interests detrimentally to him. This he has failed to do. Although they were co-defendants in the juvenile proceedings, Laura was not charged criminally and there is no suggestion that she had any real exposure to a criminal charge. While she was a potential witness who cooperated first with Mr. Tedder and then with the prosecution, there has been no showing that this change of alliance gave her any stake in the outcome of the

case.[31] As neither a party, a witness, nor a victim, Laura did not take any legal position in petitioner's criminal case.

No evidence suggests that Mr. Tedder's decision whether to call Laura as a witness presented a choice between two divergent interests. The existing record fails to support petitioner's arguments that Laura wished to see him convicted in order to gain an advantage in the juvenile proceeding and that using Laura as a defense witness might have jeopardized her alignment with the State for purposes of that proceeding. No evidence was presented about the status of the juvenile matter during the criminal case, aside from testimony at the hearing that Laura was complying with a treatment plan. The record shows, however, and petitioner admits, that if Laura had been called by Mr. Tedder at trial, the primary benefit to him would have been that her previous testimony in juvenile court could have been admitted for impeachment purposes to corroborate the "alibi" aspect of his defense. (Hr'g Tr. At 12-15, 20-23, 27, 51, 54-55.) The record contains no evidence that Mr. Kite was actively representing Laura at the time of the criminal trial, although he was still her counsel of record in the juvenile case. The evidence presented does not support a finding that Mr. Tedder's practice relationship with Mr. Kite provided him with confidential information about Laura, access to Mr. Kite's files, or any sense of loyalty to Laura. In short, petitioner has not shown that an actual conflict of interest existed.

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[31] The extent of Laura's cooperation with the prosecution is unknown. The record contains no testimony by Laura, either as a live witness or by affidavit, in any state or federal proceeding other than juvenile court. The evidence suggests that Laura's change of attitude was a personal one that came from believing her daughter and developing animosity toward her husband.

Assume for the purpose of argument, however, that a conflict of interest did exist by virtue of dual representation of Laura and petitioner.[32] Petitioner has not shown that he was adversely affected by any conflict. After a careful review of the entire record, including the state court transcripts and the evidence received at the evidentiary hearing in this case, the Court finds that Mr. Tedder did not compromise petitioner's defense due to his relationship with Mr. Kite or Laura, nor did Mr. Tedder make any tactical or other decision in his representation of petitioner to benefit Laura. As discussed below regarding the ineffective assistance claim based on the decision not to call Laura as a witness. Mr. Tedder's decision not to utilize Laura's testimony was reasonable under the circumstances and was not influenced by any adverse interest she had in the matter, by any confidential information he had about her, by any relationship he or Mr. Kite had with her. Given her attitude by the time of the trial, calling her would have been a dangerous decision, as is developed below. The Court concludes that, on this record, petitioner has failed to demonstrate that the alleged conflict of interest had any adverse effect on his trial counsel's performance or on his trial.

For these reasons, petitioner is not entitled to relief on his claim of ineffective assistance of counsel based on a conflict of interest that adversely affected his trial representation. Therefore, the Oklahoma Court of Criminal Appeals' rejection of this claim involved neither

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[32] The Court recognizes that this is a close question. Laura's cooperation with the prosecution in the criminal case and the possibility that she might have benefited in juvenile proceedings by helping the State to convict her husband poses a conflict that could easily cross the line from "potential" to "actual."

an unreasonable application of federal law nor an unreasonable determination of facts.

FAILURE TO CALL A WITNESS

Petitioner also claims that he received ineffective assistance of counsel at trial due to Mr. Tedder's failure to call Laura as a witness. To prevail on this claim, he must satisfy the familiar standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), by showing that his counsel's performance was constitutionally deficient and that the deficiency was prejudicial. Counsel's performance is deficient under Strickland if it "falls below an objective standard of reasonableness," and prejudice is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 690, 694. A reasonable probability means one "sufficient to undermine confidence in the outcome." *Id.* at 694. Here, petitioner has not satisfied either prong of *Strickland*.

The Court find from the record presented that Mr. Tedder's decision not to call Laura as a defense witness was a calculated one that was eminently reasonable under the circumstances. First, the record refutes the testimony of petitioner and his witnesses at the evidentiary hearing that the decision was made unexpectedly on the eve or in the middle of trial. The state court record supports Mr. Tedder's explanation that he referred during jury selection and his opening statement to Laura's possible testimony because he anticipated that the prosecutor would call her during the State's case. It also explains the recollection of petitioner's witnesses that they were surprised to learn that she would not be called. Contrary to petitioner's

testimony that Mr. Tedder changed his mind overnight about calling Laura after leading petitioner and his family to believe that she would be called as the last witness for the defense (Hr'g Tr. At 28-30), the state trial transcript reveals the Mr. Tedder rested the defense at the close of a trial day immediately after concluding Ms. Edmond's testimony. (Jury Trial Tr. At 748.) It was the prosecutor, when asked about rebuttal, who indicated that he intended to use Laura as a rebuttal witness (Jury Trial Tr. At 748-49), so the judge recessed the trial until the following day because her testimony was expected to be lengthy (Jury Trial Tr. At 749-50). When the trial reconvened the next day, however, the case proceeded directly to closing arguments (Jury Trial Tr. At 755), indicating that the prosecutor decided during the recess not to call Laura.

Second, the record fully supports Mr. Tedder's testimony that he decided not to use Laura as a witness because the potential harm that she would cause petitioner's defense far outweighed any potential benefit to be gained from her testimony. (Hr'g Tr. At 221.) Despite how petitioner wished to characterize the testimony given in the juvenile court trial, the record shows the factual information contained in that testimony was limited and provided little support for his defense. Wendy did not provide sufficient detail about the alleged instances of sexual intercourse during the criminal trial to render very useful Laura's prior testimony that one reason she disbelieved Wendy was because petitioner was incapable after the shooting injury of "climbing on top of her." (Juvenile Tr. at 208-09, 224.) Also, Laura testified that she had sexual intercourse with petitioner after his injury. (Juvenile Tr. at 224.) Moreover, petitioner admitted during his cross-examination at trial that he was incapable of sexual relations only for a few months

immediately following the shooting. (Jury Trial Tr. at 726-27.) Petitioner also testified at trial that he saw Wendy at least monthly during the period of alleged abuse and they were sometimes alone. (Jury Trial Tr. at 697-98.) Thus, petitioner's "alibi" was not a primary focus of his defense.

In short, the Court fully concurs in Judge Argo's conclusions that Mr. Tedder's "decision not to present Laura as a defense witness was sound trial strategy, and was not unreasonable given Laura's probable hostile attitude." (3/28/02 Report & Recom. At 19.) Accordingly, petitioner has failed to demonstrate any deficiency in trial counsel's performance.

Further. Although Judge Argo found no need to address the prejudice prong of the ineffective assistance claim, the Court considered this issue as well and concludes that petitioner was not prejudiced by Mr. Tedder's decision. In view of the limited value of Laura's testimony, it is extremely unlikely that failing to call her as a witness negatively affected petitioner's case. In fact, the opposite is true. If Laura had been called, her testimony against petitioner could have been very damaging. Her testimony concerning the allegations of sexual abuse during the juvenile case largely concerned her disbelief of her daughter. This circumstances had changed by the time of trial, when she was "extremely angry" at petitioner. (Hr'g Tr. at 184.) On this record, the Court finds no reasonable probability that Mr. Tedder's failure to call Laura as a witness created a less favorable outcome in the case.

For these reasons, petitioner has failed to establish his ineffective assistance claim arising from Mr. Tedder's decision not to call Laura as a defense witness. Therefore,

the Oklahoma Court of Criminal Appeal' reasonably rejected this claim.

CONCLUSION

For all of these reasons, the Court overrules petitioner's objections and adopts the Report and Recommendation of March 28, 2002. Judge Argo's ruling on a motion by petitioner (3/2802 Report & Recom. At 4 n. 5) is adopted without objection by respondent. Thus petitioner's Motion to Supplement Record with Relevant Telephone Directory Listings (Doc. No. 81) is granted. Petitioner's motion for Consideration of Pro Se Objections and Pro Se Complaint (Doc. No. 96) is **GRANTED**; Petitioner's Motion for Order Allowing Oral Argument (Doc. No. 95) is **DENIED**. His pro se motions to deem confessed his complaint against Larry Tedder, for an order to obtain records from the Oklahoma Administrative Office of the Courts, and for a judicial ruling (Docket Nos. 102, 103 & 104) are **DENIED** as moot.

WAYNE ALLEY
United States District Judge